

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CC CHURCH

Claimant

VS.

TAP ENTERPRISES

Self-Insured Respondent

Docket No. 1,033,266

ORDER

Respondent requests review of the December 22, 2008 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

This claim involves an otherwise compensable injury with a psychological component.¹ The Administrative Law Judge (ALJ) considered the most recent report authored by respondent's physician, Dr. Patrick L. Hughes and found the claimant to be temporarily and totally disabled. He went on to order respondent to resume payment of temporary total disability (TTD) benefits. Respondent was also ordered to provide the treatment for claimant's psychological treatment as recommended by Dr. Halfaker.

The respondent requests review of this decision, alleging that Dr. Hughes' testimony establishes that claimant's psychological issues are wholly unrelated to claimant's work-related injury. Thus, the respondent should not be responsible for TTD benefits or medical treatment and the ALJ's Order should be reversed.

Claimant argues that there is no jurisdiction for this appeal and that it should be dismissed. Claimant maintains that respondent is merely arguing that he is not entitled to TTD benefits, an issue that the Board has no jurisdiction for at this juncture of the claim.

¹ At least for purposes of this appeal, the compensability of the underlying orthopaedic aspect of claimant's claim is not in dispute.

Alternatively, should the Board conclude there is jurisdiction, claimant contends that the ALJ's Order should be affirmed, as the ALJ concluded that, based on Dr. Pro's testimony, claimant's current need for psychological treatment was caused by an aggravation or intensification of his preexisting psychological condition(s).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

This is the second time this claim has been before the Board on appeal from a preliminary hearing. Because the facts and circumstances are well known to the parties, this Board Member will merely adopt the findings of fact and conclusions of law set forth in the Board's earlier order dated August 12, 2008 and thereby avoid any unnecessary duplication.

The focus of this appeal is not on the orthopaedic aspect of claimant's injury. Rather, respondent's appeal requires this member consider whether additional evidence offered at the most recent preliminary hearing established that claimant's present need for psychological treatment is causally related to his work-related accident or wholly preexisted his compensable injury.

This issue was examined at the first preliminary hearing and the ALJ concluded that claimant's need for psychological treatment was unrelated to his work accident. On appeal, this Board Member reversed that finding and granted claimant medical treatment, ordering respondent to provide claimant with a list of 3 physicians who specialize in psychological or psychiatric matters, allowing claimant to select one to direct his psychological care.² This was based upon the opinions expressed by Dr. Pro, a psychiatrist, who indicated that claimant's low back injuries aggravated a preexisting personality disorder.³

Respondent did not commence payment of TTD benefits and on December 19, 2008 a second preliminary hearing was held at claimant's request for the sole purpose of receiving TTD payments.⁴ Although the transcript of this hearing indicates that claimant was scheduled to see Dr. Halfaker for psychiatric treatment, it appears that he had yet to commence his treatment as ordered on August 12, 2008. Nevertheless, respondent had

² Board Order, 2008 WL 4149966 (Kan. WCAB Aug. 12, 2008).

³ *Id.* at 2.

⁴ The ALJ denied TTD benefits based upon the conclusion that claimant's inability to work due to his psychological condition was unrelated to his work injury. This Board Member did not address TTD benefits in the August 12, 2008 Order due to a lack of jurisdiction over that issue.

directed claimant to Dr. Patrick Hughes for a second opinion as to the need for psychiatric treatment.

Dr. Hughes saw claimant sometime in early September 2008 and issued a report on September 11, 2008. Suffice it to say, Dr. Hughes opined that claimant's psychiatric issues are entirely unrelated to his work-related accident. He further suggested that Dr. Pro's psychiatric report "is inaccurate, has several frankly incorrect medical constructs in it, and therefore of minimal value to the Court."⁵

The ALJ considered the new evidence as to the causal connection between claimant's work injury and his present need for psychiatric treatment, including Dr. Hughes' report as well as the interim medical reports relating to claimant's sleep apnea treatments, and then made the following observations:

The new report from Dr. Hughes stated that the claimant does not show signs of major depression, and that the claimant's personality disorder predated the work injury and was unaffected by the work injury. Hughes concurred with Pro that the claimant has developed a pain disorder with medical and psychological features, but felt that did not represent a bona fide psychiatric illness or injury.

Even if taken alone, Dr. Hughes' report supports at least one psychological "injury" resulting from the work accident, the pain disorder. Hughes did not think this should be considered an "injury," but workers compensation case law has long held that psychological conditions are compensable if directly traceable to a physical work injury, [sic] see *Gleason v. Samaritan Home*, 260 Kan. 970, 926 P.2d 1349 (1996), *Boutwell v. Domino's Pizza*, 25 Kan.App.2d 110, 959 P.2d 469 (1998).⁶

The ALJ went on to conclude:

The record still shows by a preponderance of the evidence that the claimant has psychological conditions either caused or aggravated by the physical work injury. The respondent and insurance carrier remains liable for treatment of the claimant's psychological conditions, and shall provide such treatment as recommended by Dr. Halfaker.⁷

This Board Member has considered the evidence and concludes the ALJ's preliminary hearing Order should be affirmed. While Dr. Hughes seems to have little regard for Dr. Pro's opinions, at this juncture of the claim his view is at least as persuasive as Dr. Hughes'. And as noted by the ALJ, both Dr. Hughes and Dr. Pro agree that claimant

⁵ P.H. Trans. (Dec. 19, 2008), Ex. 2 at 4 (Dr. Hughes' Sept. 11, 2008 report).

⁶ ALJ Order (Dec. 22, 2008) at 2.

⁷ *Id.*

has a pain disorder with medical and psychological features. That is the condition that Dr. Pro says was aggravated by claimant's work-related accident. As was indicated in the Board's earlier opinion, it is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁸ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁹

The ALJ's Order dated December 22, 2008 is affirmed in all respects.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁰ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 22, 2008 is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Geoffrey Clark, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge

⁸ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁹ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

¹⁰ K.S.A. 44-534a.